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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*,

v.

BRIAN F. WEBER, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY SOUTHEASTERN LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AND BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

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February 28, 1979

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MOTION BY SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE, FOR LEAVE TO FILE A BRIEF

In accordance with this Court's Rule 42, Southeastern Legal Foundation, Inc. ("Southeastern") moves this Court for leave to file the attached brief *amicus curiae* in the above case. Concurrent with the filing of this motion, Southeastern has transmitted to the Clerk of this Court copies of letters of consent from petitioners United Steelworkers and Kaiser, and from respondent Brian F. Weber. The Solicitor General, on behalf of petitioners United States of America and

Equal Employment Opportunity Commission, has refused consent to Southeastern, but has stated that he will not oppose the filing of this motion. A copy of the Solicitor General's letter is also on file with the Clerk.

Southeastern is a Georgia not-for-profit corporation organized for the purpose of advancing the broad public interest in adversary proceedings involving significant issues. Southeastern takes a special interest in questions of law of a national scope that have a direct effect on the southeastern region. Southeastern is dedicated to economic and social progress through the equitable administration of law. Although it has no direct interest in this case as an organization, it represents the members of the public who share Southeastern's dedication to assisting the courts in guaranteeing that the rights of all persons are properly protected and balanced in the courts. Southeastern's representation of the public interest includes the representation of the several hundred individuals and organizations which contribute financially to Southeastern.

In addition to the filing of a brief *amicus curiae* with the Fifth Circuit in the instant case, Southeastern has participated as *amicus curiae* in other employment discrimination cases involving "reverse discrimination." Southeastern filed a brief *amicus curiae* in *Virginia Commonwealth University v. Cramer*, No. 76-1937 (4th Cir. Aug. 15, 1978), and in 1977 urged a reconsideration of the steel industry consent decrees of 1974. That latter effort led to a memorandum opinion, by the District Court for the Northern District of Alabama, which clarified its view of the legality of the steel industry consent decrees. *United States v. Allegheny-Ludlum Industries, Inc.*, No. CA 74-P-0339-S (N.D.Ala. Mar. 21, 1978) (cited at p. 4 of the United Steelworkers brief to this Court in this case).

However this Court decides this case, its holding has the potential of becoming a signpost to all who are concerned about the direction of affirmative action in employment. The Court has the opportunity to explain what will be considered permissible affirmative action in employment and by whom and when it may be undertaken or ordered. In view of the potentially broad impact of this case, the participation of *amici curiae* is especially appropriate. Southeastern does not presume to represent the totality of the public interest. However, we believe the attached brief presents an important public interest view which will otherwise not be presented to the Court.*

Respectfully submitted,

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* Last term, this Court permitted Southeastern to appear as *amicus curiae* in Duke Power Company v. Carolina Environmental Study Group, Inc., 434 U.S. 937 (1978); United States Nuclear Regulatory Commission v. Carolina Environmental Study Group, 434 U.S. 937 (1978); and Tennessee Valley Authority v. Hill, 435 U.S. 902 (1978).

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., **AMICUS CURIAE**

INTEREST OF AMICUS CURIAE

The interest of Southeastern Legal Foundation, Inc. ("Southeastern") and its reasons for participating in this case are set forth in the attached motion for leave to file this brief. That statement of interest is incorporated herein.

SUMMARY OF ARGUMENT

The use of quotas as a method of selecting eligible workers for jobs or other benefits of employment should be strictly limited to remedying the effects of past illegal discrimination against identifiable victims of that discrimination. Such remedial quotas should operate to place a discriminatee into his or her "rightful place," which would have been occupied by the discriminatee but for previous illegal discrimination. The use of quotas conditioned upon findings of past illegal discrimination and limited to assisting identified victims of that discrimination creates no new victims and thereby eliminates the possibility of "reverse discrimination."

Although a quota does not operate to return an injured discriminatee to his or her rightful place as accurately as does an adjustment of seniority, it is an acceptable remedial tool so long as it does not operate to create new victims of discrimination.

This limited use of quotas guarantees protection for all workers by producing remedies for past injuries while not creating new injuries. It is premised upon specific findings of past discrimination and specific identification of victims in each case. To the extent it requires such findings, this approach may well discourage the use of quotas voluntarily or in settlement agreements.

The practical result of this approach is that quotas would be limited to case-by-case agency, legislative, and judicial determinations which include specific findings of past illegal discrimination and identifiable

victims. Southeastern believes that this limited approach to the use of quotas is the only approach consistent with the Constitution, Title VII of the Civil Rights Act of 1964, equitable principles, fundamental fairness and the decisions of this Court.

ARGUMENT

I.

Employment Quotas Should Be Strictly Limited To Remedying The Effects of Past Illegal Discrimination On Identifiable Victims of That Discrimination

Southeastern urges this Court to affirm the holding below insofar as it states (a) that employers and unions may not, pursuant to Title VII, voluntarily adopt racial quotas in the absence of a finding of prior hiring or promotion discrimination, and (b) that preferences assisting individual victims of discrimination are permitted by Title VII. *See Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 224-25 (1977), *rehearing denied*, 571 F.2d 337 (5th Cir. 1978) (*"Weber"*).

Southeastern believes that such findings are a prerequisite to the use of quotas as individualized relief. Boiled down to its bare bones, this case is about whether one worker may be arbitrarily preferred over another in employment opportunities when both are equally situated. As characterized by the petitioners, this case is about the permissible scope of Title VII voluntary compliance. While that is an important feature of this case, undue attention and deference to voluntary compliance as a feature of Title VII tends

to obscure that this case is about rights. Indeed it is a certain type of voluntary compliance—the quota—which the courts below found to have violated some of those rights.

Southeastern believes that a quota can be used in a way that protects the rights of all workers. A quota which works to remedy the injuries of past employment discrimination and at the same time respects the rights of incumbent non-victim workers serves the goal of equal employment opportunity for all. A quota which grants preferential treatment to some at the expense of others falls short of that goal of equality. The quota adopted by Kaiser and United Steelworkers was a quota of the latter type.

A quota which seeks to place an individual worker in the position he would have held but for illegal discrimination against him, need not simultaneously operate to discriminate against some other worker. As the Fifth Circuit said in the decision below:

> "A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment 'not because he is Black, but because, and only to the extent, he has been discriminated against.' "

Id. at 224. Another way of expressing the Fifth Circuit's statement is that a quota is only objectionable if it affects two equally situated individuals and grants a preference to one of them. If, on the other hand, a quota is used only to place an identified victim of past discrimination in his rightful place, the quota discriminates against no one. Its operation is strictly

remedial. The use of a quota in this latter sense is to reconstruct what would have happened to the victim of past discrimination if he had been treated equally with his peers at the time of the discrimination. While a quota does not operate to place a victim of past discrimination in his rightful place as successfully as an award of proper seniority, in certain situations it may be the most efficient remedial tool available.

Southeastern reads the Fifth Circuit's opinion to require, as a prerequisite to using quotas, both a finding of past discrimination and an identification of individual victims. *See id.* at 224-25. The first part of the test is expressly stated by the Fifth Circuit. The second part of the test is expressed through the use of the term "rightful place." Both parts of the test are founded upon decisions of this Court.

In *Regents of University of California v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2755 (1978) ("*Bakke*"), Mr. Justice Powell stated that this Court had never approved preferential classifications in the absence of proven constitutional or statutory violations. In his discussion of employment discrimination cases, he noted that racial preferences were premised upon the need to remedy injuries caused by past discrimination. *Id.*, 98 S.Ct. at 2754. Thus a finding of past discrimination and a need for remedial relief are prerequisites to the use of quotas.

This Court has also held that the process of returning victims of past discrimination to their "rightful places" demands an identification of the actual victims of the discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72

(1977) ("*Teamsters*"). *Teamsters* dealt with seniority rights as opposed to quotas, but the goal of the remedial relief was identical to that of the quota in this case—to put victims in their rightful places. If the restoration of seniority rights in *Teamsters* could be achieved only after evidentiary hearings which identified victims and disclosed the extent of necessary relief, *id.* at 376, no less is necessary for the use of quotas.

In sum, the proper test for the use of quotas requires both a finding of past illegal discrimination and an identification of victims.

II.

All Entities Which Adopt Employment Quotas Must First Satisfy The Discrimination-Finding and Victim Identification Test

Since the purpose of requiring discrimination-finding and victim identification is to guarantee that remedial quotas protect the rights of all workers, there can be no variations in the rigors of the test depending on what entity is applying it. Thus, the demands of the test apply to courts, government agencies, legislatures and voluntary parties. No other standard can guarantee equal employment opportunity for all.

All judicial decrees, including consent decrees, and government conciliation agreements, which include quotas, must be premised upon findings and identifications. If this Court should hold that the type of quota test asserted by Southeastern has retrospective application, existing decrees, settlements and agreements using quotas may be subject to challenge if they have

not been predicated upon adequate findings and identifications.

The Fifth Circuit held that the hiring ratio agreed to by Kaiser and United Steelworkers could not have been approved even if it had been judicially imposed. *Weber, supra* at 224. The approach of the Fifth Circuit properly assumes that the outer limits of remedial relief under Title VII are measured by what the courts can do in the name of equity and not by what private parties may do voluntarily. Even though the court did not "probe into the distinctions between court-ordered remedies and permissible remedies agreed upon voluntarily by private parties," *id.*, the court did say that "there is strong authority to support the position that courts are not subject to the same restrictions as employers." *Id.* at 223.[1]

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[1] If there is any ambiguity in the Fifth Circuit's opinion with respect to the permissible use of quotas, it comes from two statements found in its discussion of the district court's decision. First, the Fifth Circuit stated that "Title VII does not prohibit courts from discriminating against individual employees by establishing quota systems where appropriate." Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 223 n.12 (1977), *rehearing denied*, 571 F.2d 337 (5th Cir. 1978). The court's choice of words is unfortunate. While Title VII permits judicially ordered quotas, such quotas are remedial and do not discriminate "against individual employees" if properly premised on findings and identifications. According to the Fifth Circuit's discussion in the text following footnote 12, such carefully conditioned quotas are what the court considered appropriate.

Second, by referring to the steel industry consent decrees and the Fifth Circuit's 1975 decision upholding them, *id.* at 223, the opinion leaves the impression that those consent decrees were legally correct in the adoption of quotas which were similar to the quota in this case. This impression must be

Petitioners argue that the Title VII goal of voluntary settlement permits private parties to adopt quota remedies without first having to make "findings" of past discrimination. If courts may not grant quota relief without first finding past illegal discrimination and identifying victims, then private parties must be at least, if not more, restricted in the adoption of quotas.

Even though this case does not involve a consent decree and this Court does not specifically have to address consent decree relief, Southeastern believes that any decision reached by this Court which does not consider the full range of possible quota-creating mecha-

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examined in light of a post appeal statement by the district judge that he had not determined whether there had been prior employer discrimination before he signed the consent decrees. *See* United States v. Allegheny-Ludlum Industries, Inc., No. C.A. 74-P-0339-S, memorandum op. 5, 9 (N.D.Ala. Mar. 21, 1978) (*"Allegheny-Ludlum"*).

It is inexplicable why the Fifth Circut arrived at what appear to be conflicting decisions in this case and the steel industry case. *See* United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The district judge has stated that the "essence" of the relevant steel industry consent decree "is a collective-bargaining agreement. . . ." *Allegheny-Ludlum, supra* at 3. The quota in this case is also contained in a collective bargaining agreement. Likewise in both cases there were no findings of discrimination before the quotas were adopted. If the only difference between *Weber* and the steel industry consent decrees is that the latter were subscribed by a judge, there is no meaningful difference. In retrospect, one further difference may be that the Fifth Circuit was not presented with reverse discrimination claims and arguments in the steel industry consent decree case. Southeastern suggests that the Fifth Circuit would decide the steel industry consent decree case differently today.

nisms, from voluntary programs to litigated decrees, will leave everyone—the courts, the government, and private parties—unclear as to their rights and responsibilities with respect to affirmative action relief. If this Court merely affirms the Fifth Circuit's decision, some may conclude that the law prevents voluntary agreements and judicially imposed quotas in the absence of specific findings and identifications, but that the law allows consent decrees such as the steel industry decrees. Such a result would be illogical and open the courts to manipulation efforts by private parties. As Judge Wisdom rightly noted in his dissent below, employers could use friendly suits to "circumvent the holding of *Weber*." *Id.* at 229 n.6 (Wisdom, J. dissenting).

Southeastern agrees with Judge Wisdom's logic that the holding of the majority in *Weber* necessarily means that district courts, "before accepting . . . consent decree[s], will be forced to determine the existence and extent of past discrimination by the defendants." *Id.* Southeastern believes Judge Wisdom's dissent correctly describes the implication of a requirement that quotas must be remedial only and premised only upon a finding of discrimination and an identification of victims.

Logic compels the further conclusion that everyone, private party, government agency, and court, is bound by the strict requirements of the "finding/identification" test.[2] Any other result would manifest a disre-

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[2] So long as there is a legally sufficient finding of past illegal discrimination and identification of victims, the use of quotas as remedial tools should be permitted. For courts and government adjudicatory agencies subject to judicial review, the

gard for the rights of employees innocent of any wrongdoing. In *Teamsters*, this Court showed particular concern for the legitimate expectations of innocent employees, by requiring the district court to strike a balance "between the statutory rights of victims and the contractual rights of non-victim employees." *Teamsters, supra* at 376.

Utilizing a quota as a remedial tool only when it operates to place identified victims of past illegal discrimination in their "rightful places" (or as close as

findings and identifications would be tested, of course, by the preponderance of the evidence standard. Private parties which adopt quotas cannot be expected to objectively examine evidence detrimental to themslves, and therefore a preponderance standard may not be an adequate safeguard as to them. Perhaps only findings which are the equivalent of admissions can justify the adoption of quotas by private parties. Thus, they may be said to adopt quotas at their own risk. While this approach may discourage voluntary agreements or settlements including quota provisions, it may be the only approach which satisfies all the relevant interests and legal standards while guaranteeing equal opportunity for all.

Acknowledging that the Congress may not be subject to the same limitations in relief choice as apply to courts, government agencies and private parties, Southeastern nevertheless believes that even a congressionally approved quota must be prefaced by what Mr. Justice Powell has called "detailed legislative consideration of the various indicia of previous constitutional or statutory violations. . . ." Regents of University of California v. Bakke, ___ U.S. ___, 98 S.Ct. 2733, 2755 n.41 (1978) (opinion of Powell, J.). Even if the Congress may be able to legislate the use of quotas, based on past constitutional or statutory violations, any entity responding to the legislative determination should still be required to apply the legislative determination on a case-by-case approach. In any event, Southeastern does not read the Title VII legislative history so as to justify the type of quota which has injured Weber.

practicable to their rightful places), strikes a proper balance. Innocent employees have no "legitimate expectations" subject to injury by the placement of victims of discrimination into their rightful places. But, unless this Court makes it absolutely clear that quotas may be used only after a finding of discrimination and an identification of victims, the rights of innocent employees will not be adequately protected.

This Court held in *Teamsters* that in striking the balance between statutory rights of victims and contractual rights of non-victim employees, a district court must "state its reasons so that meaningful review may be had on appeal." *Id.* ("contractual rights" in the *Teamsters* context means "seniority"). In the instant case it is more accurate to describe the two interests to be balanced as "the statutory rights of victims against the statutory rights of potential victims." If reasons for meaningful review were required in *Teamsters*, they are even more required here when statutory rights are balanced against each other.

As a practical matter, employees innocent of any wrongdoing have had a difficult time obtaining meaningful review of voluntary agreements, settlements and judicial decrees which contain quotas affecting those employees.[3]

[3] For example, attempts by incumbent non-minority steelworkers to challenge the scope and effects of the steel industry consent decrees have had no success. In Martini v. Republic Steel Corp., 532 F.2d 1079 (6th Cir.), *cert. denied*, 429 U.S. 927 (1976), principles of comity prevented the steelworkers from pursuing relief, and in United States Steelworkers Justice Committee v. United States, 553 F.2d 415 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978), their intervention challenge was held untimely.

In the typical voluntary collective bargaining agreement, such as the one Weber has challenged, the employer and the union agree to take certain affirmative action. The impetus for such agreements may be simply the good intentions of the parties, or, as in this case, fear of future litigation and threats from the federal government. Whatever the reason, innocent employees such as Weber have no say in the agreement process and are not technically parties to it.

Likewise, conciliation settlements, or agreements, and consent decrees do not generally include parties with an interest in opposing or limiting the nature and degree of affirmative action. Rather, the disgruntled parties involved, if any, tend to be those who argue that they have not received *enough* relief. The steel industry litigation involving two consent decrees adopted in 1974 is an excellent example of the process at work. *See United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

If innocent employees are not made parties from the very start, they can only defend their interests if they are quick enough to realize what might happen to them before it actually does and seek to intervene before time defeats them.

Realistically, many potential victims of quotas will not act in time to intervene in existing proceedings, whether the proceedings are before a government agency or before a court, since they generally fail to react until the quota implementation has its adverse impact on them. Their failure to intervene will prevent a proper representation of their interests unless the decision makers are constrained by the strict requirement of finding past illegal discrimination and identifying victims before instituting a quota. If the adoption of quotas is so carefully circumscribed, the dangers of creating new victims of quota discrimination will be greatly reduced. Quotas properly used will be strictly remedial and will produce no adverse consequences for anyone.

The approach to quotas which Southeastern urges this Court to adopt is, we believe, the only approach which adequately balances the private settlement theme of Title VII, Title VII's specific prohibition against employment discrimination, the overall purpose of Title VII to guarantee equal employment opportunities for all, and the equitable principles enunciated by this Court in *Teamsters, supra* at 376. Unlike the petitioners, Southeastern does not attach such superior and overriding importance to voluntary settlement as to justify virtually any form of voluntarily adopted affirmative action. However, while quotas must be limited in use and only allowed after certain conditions are met, they are not foreclosed by the approach suggested in this brief.

CONCLUSION

Southeastern respectfully urges this Court to affirm the decision of the Fifth Circuit by holding that quotas may be used only after a factual finding of past illegal discrimination and then only to provide relief to identified victims of the illegal discrimination by placing them, so far as practicable, in their rightful places. This Court is further urged to apply this standard to all entities which might adopt or order the use of quotas.

Respectfully submitted,

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